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No. 71-1056

In the Supreme Court of the United States

OCTOBER TERM, 1971

HOWARD MECHANIC AND LAWRENCE KOGAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is reported at 454 F.2d 849.

JURISDICTION

The judgment sought to be reviewed was entered on December 22, 1971. On January 13, 1972, the court denied a petition for rehearing. On February 2, 1972, Mr. Justice Blackmun entered an order extending the time for filing a petition for a writ of certiorari to and including February 19, 1972. The petition was filed on February 17, 1972. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

463-587—72

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause of the Fifth Amendment bars a federal prosecution for interference with policemen and firemen performing federally protected duties after a state conviction for contempt of court arising out of the same series of events.

2. Whether the Attorney General's Memorandum to the United States Attorneys, dealing with federal prosecutions for conduct previously subject to state prosecution bars the present prosecution.

STATUTES AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the Constitution provides in relevant part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *.

18 U.S.C. 231 provides:

> (3) Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On March 24, 1970, Washington University, which is located in St. Louis County, Missouri, obtained a temporary restraining order in a state court enjoining petitioners and others from engaging in disorderly conduct on university property (Pet. 2; Pet. App. 11a–12a).

On May 4, 1970, a large number of demonstrators marched to the Army and Air Force R.O.T.C. buildings, and threw stones and other objects at them (Pet. App. 2a). A fire broke out in the Air Force R.O.T.C. building, and a fire truck came to the scene but had to retreat under a heavy barrage of rocks, bottles and other items thrown by the crowd. A second fire truck similarly had to retreat. Upon arrival of a third fire truck, St. Louis County police attempted to form a protective screen between the firemen and the demonstrators. They also were subjected to a barrage of objects (Pet. App. 2a–3a). A witness saw each petitioner throw a cherry bomb at the police line (Pet. App. 3a).

Petitioners, with others, were found guilty of contempt for violating the restraining order, and each served part of a six-month sentence. (See *Mechanic* v. *Gruensfelder*, 461 S.W. 2d 298.) After their state contempt convictions, petitioners were indicted and convicted in federal court of interference with firemen and policemen lawfully engaged in federally protected duties (18 U.S.C. § 231(a)(3)). The court of appeals affirmed the convictions, rejecting petitioners' claims, among others, that their federal convic-

tions are barred by the Double Jeopardy Clause of the Fifth Amendment and are invalid because they violate the policy of the Justice Department, as stated in a Memorandum by the Attorney General to the United States Attorneys.

ARGUMENT

1. Petitioners contend that the Double Jeopardy Clause of the Fifth Amendment barred federal prosecution for their acts. This contention is without merit for two separate reasons. Even if the federal prosecution had followed a contempt conviction in a federal court, petitioners would not have been placed in jeopardy twice for the same offense. And even if the Double Jeopardy Clause would foreclose two convictions of the kinds involved here by a single sovereign, it does not bar a second conviction by a separate sovereign.

a. The Double Jeopardy Clause of the Fifth Amendment bars a prosecution only when a defendant has previously been placed in jeopardy for the same offense. *United States* v. *Ewell*, 383 U.S. 116. Here, petitioners' first offenses were for contempt of court for violating a temporary restraining order, and their second offenses were for interfering with federally-protected functions. The basic test to determine whether two acts constitute the same offense is whether each offense "requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304; *Gore* v. *United States*, 357 U.S. 386; *Gavieres* v. *United States*, 220 U.S. 338. Here, the gravamen of the contempt was engaging in activity which disrupted the normal operations of the university. The presence of policemen or firemen was not a requisite of the offense.

Conversely, the gravamen of the second offense was interfering with policemen or firemen in the performance of their duties, and disruption to the university's operations was not a necessary element. Both convictions did rest in fact on the same acts, the throwing of cherry bombs at police officers, but the offenses were not the same because the necessary elements of proof were different. Although this Court has held that a conviction may not be based on a factual determination inconsistent with an earlier acquittal, *Ashe* v. *Swenson*, 397 U.S. 436, it has declined to adopt the position suggested by some members of the Court that subsequent prosecutions arising out of the "same transaction" are generally barred by the Double Jeopardy Clause (id. at 448–460, concurring opinion of Brennan, J.).

Moreover, contempt is a unique crime, *O'Neal* v. *United States*, 190 U.S. 36; *Bessette* v. *Conkey*, 194 U.S. 324. It is the only means by which a court can protect its authority, and it has consistently been held in the lower courts not to come within the ambit of the Double Jeopardy Clause of the Fifth Amendment. *United States* v. *Rollerson*, 449 F. 2d 1000 (C.A. D.C.);[1] *O'Malley* v. *United States*, 128 F.2d 676 (C.A. 8), reversed on other grounds, 317 U.S. 412; *Merchants' Stock and Grain Co.* v. *Board of Trade*, 201 Fed. 20 (C.A. 8); *United States* v. *Mirra*, 220 F. Supp. 361 (S.D.N.Y.).

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[1] In *Rollerson*, the defendant, while on trial, threw a water pitcher at the prosecutor. As a result of the same act, the defendant was held in criminal contempt and later was indicted and prosecuted for assault with a dangerous weapon and assault of a federal officer in performance of his official duties.

b. Even if the offenses were the same there would be no double jeopardy in this case, because the convictions were by separate sovereigns. As petitioners acknowledge (Pet. 5), their argument to the contrary is inconsistent with *Abbate* v. *United States*, 359 U.S. 187.

Pointing to this Court's decisions in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, and *Benton* v. *Maryland*, 395 U.S. 784, petitioners contend that this Court has all but discarded the "separate sovereignty" theory and that because *Abbate* was grounded on that theory, *Murphy* and *Benton* have in effect "excised the theoretical underpinning of * * * *Abbate*" (Pet. 6). Petitioners ask this Court to review *Abbate* in light of *Murphy* and *Benton*.

However, in *Waller* v. *Florida*, 397 U.S. 387, in rejecting a claim of separate sovereignty between a state and a municipal court, this Court implicitly affirmed the principle of *Abbate*. Moreover that principle has consistently been applied by federal courts.[2]

2. Petitioners contend that then Attorney General Rogers' Memorandum to the United States Attorneys

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[2] *See e.g., Waller* v. *Florida*, 397 U.S. 387; *United States* v. *Jakubaki*, 267 F.2d 669 (C.A. 7), *certiorari denied*, 362 U.S. 936; *Hoopingarner* v. *United States*, 210 F.2d 465 (C.A. 6); *Feiring* v. *United States*, 340 F.2d 837 (C.A. 8), certiorari denied, 381 U.S. 902; *Colton* v. *United States*, 407 F.2d 367 (C.A. 8); *United States* v. *Hutul*, 416 F.2d 667 (C.A. 7); *Hill* v. *Reto*, 422 F.2d 840 (C.A. 5); *United States* v. *Symons*, 438 F.2d 764 (C.A. 8); *United States* v. *Smith*, 446 F.2d 200 (C.A. 4).

(Pet. App. B)[3] should bar the present action because the United States Attorney did not seek or receive express approval of the Department of Justice for the federal prosecutions of petitioners. However, the Memorandum "was simply a housekeeping provision of the [Justice] Department * * *." *Sullivan* v. *United States*, 348 U.S. 170, 173. See also, *United States* v. *Hutul*, 416 F.2d 607 (C.A. 7).

Petitioners' reliance on *Petite* v. *United States*, 361 U.S. 529, and *Redmond*, v. *United States*, 384 U.S. 264, is misplaced. In those cases the government voluntarily moved to vacate the lower court's decisions. There was no holding of this Court that the government was required to do so. See, e.g., *Petite*, *supra*, at 531.

Moreover, it is the view of the government that the Memorandum was not applicable here. Although the Memorandum refers to prosecutions based on the "same act or acts," the thrust of the Memorandum is to discourage duplicity of prosecution for the same essential crime, and the contempt conviction would not be considered a state prosecution within the meaning of the Memorandum. For this reason, the United States Attorney could not have been expected to conclude that authorization for the suit was required by the Memorandum.

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[3] The Memorandum advises United States Attorneys that the Justice Department should not prosecute a defendant under federal law after he has been prosecuted under state law for the same act or acts without compelling reasons and prior approval by an Assistant Attorney General.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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APRIL 1972.

U.S. GOVERNMENT PRINTING OFFICE 1972